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January 3, 2007

BY HAND

The Honorable Robert D. Lenhard
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 5879
Democratic Congressional Campaign Committee and John Lapp, as treasurer

Dear Commissioner Lenhard:

We write on behalf of our clients, the Democratic Congressional Campaign Committee and John Lapp, as treasurer, to respond to the Complaint filed by J.D. Hayworth for Congress in the above-referenced matter. The Commission should dismiss the Complaint and close this matter.

STATEMENT OF FACTS

The DCCC is a "national committee of a political party" and a "political party committee," as those terms are used throughout Part 109 of Commission regulations. *See, e.g.*, 11 C.F.R. § 109.30 (2006). The Constitution guarantees the right of national party committees, including the DCCC, to make independent expenditures. *See Colorado Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996). *See also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 213-19 (2003) (invalidating statute requiring party committees to choose between making coordinated expenditures and independent expenditures). Commission regulations acknowledge and protect this right. *See* 11 C.F.R. § 109.30.

Like each of its counterparts at the House and Senate levels, the DCCC made independent expenditures during the 2006 election cycle. It did so through an independent expenditure program that was established and operated to comply with the Commission's coordination rules. Even before the Commission revised those rules in June 2006, the DCCC had erected an internal "wall" to ensure that its independent expenditures were made without access to information about candidate plans, projects, activities or needs.

The enclosed affidavit from Ann Marie Habershaw, the DCCC's chief operating officer, details these "wall" procedures. The DCCC assigned selected individuals to work specifically on the independent expenditure program, placed them in separate office space outside the DCCC's regular headquarters, and barred them from contact with affected Democratic campaigns and their agents. It barred its regular staff from discussing House races with those working on the independent expenditure program. Finally, the vendors who worked on the independent expenditure program were barred from contact with affected campaigns and their agents.

The DCCC informed staff and vendors of these prohibitions in several ways. First, it provided staff and vendors with written memoranda that detailed the "wall" procedures. Second, it required staff on both sides of the "wall" to attend trainings at which the procedures were presented and discussed. Third, it held special trainings for vendors to the independent expenditure program, educating them on the procedures. As new staff were added, they were informed of the procedures, both in writing and verbally.

The DCCC advertisement at issue in the Complaint – which supported Harry Mitchell, the newly-elected Democratic Member of Congress from Arizona's Fifth Congressional District – was produced and distributed by the DCCC's independent expenditure program under these procedures. Accordingly, it was developed under conditions to ensure that candidates and their agents would not be materially involved in decisions about it.

The Complaint claims that, because the advertisement seemed similar to one that was distributed by the Mitchell campaign, it must have been coordinated with that campaign. However, the Complaint alleges no specific fact to show that the "conduct" standard of the coordination test would have been met, such as the use of a common vendor. Here, in fact, the DCCC advertisement was prepared by McMahon Squier and Associates, which did not perform services for the Mitchell campaign. The Complaint's allegation of coordination rests entirely on speculation that the advertisement "would necessarily have required Harry Mitchell's material involvement." Compl. at 2.

DISCUSSION

The conduct standards in 11 C.F.R. § 109.21(d) "are not met if .... [a] political committee has established and implemented a firewall" meeting certain requirements. 11 C.F.R. § 109.21(h). The firewall must be designed and implemented to prohibit the flow of information between those providing services for the sponsor, and those who have provided services to the affected candidate. *See id.* § 109.21(h)(1). It must also be described in a written policy that is distributed to all relevant, affected employees and consultants. *See id.* § 109.21(h)(2).

The Commission adopted this "safe harbor ... as a way for organizations to respond to speculative complaints alleging coordination when organizations are faced with trying to 'prove a negative' by showing that coordination did not occur." Coordinated Communications, 71 Fed. Reg. 33,190, 33,206 (2006). Only "specific information" showing the flow of material information about a candidate's plans, projects, activities or needs to the sponsor is sufficient to defeat the presumption that the conduct standard has not been met. *See id.* § 109.21(h).

The DCCC's firewall surpasses the requirements of § 109.21(h). Each of the necessary conditions for the "safe harbor" is met. First, the "wall" was designed and implemented to prohibit the flow of information between the independent expenditure program and the affected campaigns. *See id.* § 109.21(h)(1) and Habershaw Aff. ¶¶ 2-3. Second, the "wall" procedures were described in written policies, that in turn were distributed to all relevant employees and vendors. *See* 11 C.F.R. § 109.21(h)(2) and Habershaw Aff. ¶ 5. Moreover, the DCCC took additional steps not required by the safe harbor. These included, *inter alia*, limiting the development and distribution of independent expenditure advertisements to specified individuals, and placing them in separate office space away from the Committee's general headquarters. *See* Habershaw Aff. ¶ 3-4.

The Complaint provides no "specific information" to show the flow of material information about the Mitchell campaign's plans, projects, activities or needs to the DCCC's independent expenditure program. *See* 11 C.F.R. § 109.21(h). Rather, it relies on just the sort of "speculation" from which the safe harbor was designed to protect political committees. 71 Fed. Reg. at 33,206. Were the Commission to assume that visual or thematic similarity between two advertisements is sufficient to defeat the operation of the safe harbor – a similarity which, by the way, the Complaint exaggerates with its presentation of a chart developed by the Hayworth campaign – then the safe

harbor would be functionally meaningless. That cannot have been the outcome that the Commission intended when it wrote the rules.

The DCCC emphatically denies that the advertisement at issue was coordinated in any way with the Mitchell campaign. As an independent expression of the DCCC's own political views, developed and produced under procedures that surpassed the Commission's safe harbor, it provides no basis for the investigation that Complainant so self-servingly seeks. The Commission should dismiss the Complaint, take no further action, and close this matter.

Very truly yours,

Brian G. Svoboda
Counsel to the DCCC

Enclosure

cc: Vice Chairman Mason
Commissioner Toner
Commissioner von Spakofsky
Commissioner Walther
Commissioner Weintraub
Lawrence H. Norton, Esq.